STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

December 18, 2020

Joshua K. Clendenin
Senior Assistant City Attorney
City of Concord
1950 Parkside Drive
Concord, CA 94549

Re: Your Request for Advice
Our File No. A-20-143

Dear Mr. Clendenin:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.[1] Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Contra Costa County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit the City of Concord from entering into an energy services contract with a company to develop energy related improvement options and then perform the work, but only after the contract is amended to reflect the actual work the City authorizes the company to perform?

[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

Yes. Although Section 1090 would not prohibit the City from entering into a single contract with the company to develop energy related improvement options and then to perform the work, it would prohibit the City from amending the contract after considering the options in order to select the actual work it authorizes the company to perform in light of the company's involvement in determining the scope of work under the initial contract.

FACTS AS PRESENTED BY REQUESTER

You are a Senior Assistant City Attorney seeking Section 1090 advice on behalf of the City concerning a potential energy services contract. Chapter 3.2 of Division 5 of Title 1 of the Government Code (Sections 4217.10 - 4217.18) establishes a process for public agencies to develop energy conservation, cogeneration, and alternate energy supply projects at public facilities. Section 4217.12, which relates to energy service contracts, provides:

> (a) Notwithstanding any other provision of law, a public agency may enter into an energy service contract and any necessarily related facility ground lease on terms that its governing body determines are in the best interests of the public agency if the determination is made at a regularly scheduled public hearing, public notice of which is given at least two weeks in advance, and if the governing body finds:
>
> (1) That the anticipated cost. to the public agency for thermal or electrical energy or conservation services provided by the energy conservation facility under the contract will be less than the anticipated marginal cost to the public agency of thermal, electrical, or other energy that would have been consumed by the public agency in the absence of those purchases.
>
> (2) That the difference, if any, between the fair rental value for the real property subject to the facility ground lease and the agreed rent, is anticipated to be offset by below-market energy purchases or other benefits provided under the energy service contract.
>
> (b) State agency heads may make these findings without holding a public hearing.

Government Code Section 4217.16 provides:

> Prior to awarding or entering into an agreement or lease, the public agency may request proposals from qualified persons. After evaluating the proposals, the public agency may award the contract on the basis of the experience of the contractor, the type of technology employed by the contractor, the cost to the local agency, and any other relevant considerations. The public agency may utilize the pool

> of qualified energy service companies established pursuant to Section 388 of the Public Utilities Code and the procedures contained in that section in awarding the contract.

Public Utilities Code Section 388 provides:

> (a) Notwithstanding any other provision of law, a state agency may enter into an energy savings contract with a qualified energy service company for the purchase or exchange of thermal or electrical energy or water, or to acquire energy efficiency or water conservation services, or both energy efficiency and water conservation services for a term not exceeding 35 years, at rates and upon those terms approved by the agency.
>
> (b) The Department of General Services or any other state or local agency intending to enter into an energy savings contract or a contract for an energy retrofit project may establish a pool of qualified energy service companies based on qualifications, experience, pricing, or other pertinent factors. Energy service contracts for individual projects undertaken by any state or local agency may be awarded through a competitive selection process to individuals or firms identified in the pool. The pool of qualified energy service companies and contractors shall be reestablished at least every two years or shall expire.

The City is interested in entering into a single contract with a company whereby the company will provide an Energy Efficiency Program including both project development and installation services described in Phase 1 and Phase 2 of the contract. In Phase 1, the company will develop energy related improvement options for the City. In Phase 2, the company will implement specific options that it developed in Phase 1, and the City has the sole authority to include or exclude any of the specific options. Therefore, the contract between the City and the company will have to be amended following Phase 1 to allow for the inclusion of the options the City chooses for Phase 2.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

Section 1090 provides, in part, that "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

Independent contractors

Courts have long found that independent contractors that serve in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to Section 1090. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291 ["statutes prohibiting personal interests of public officers in public contracts are strictly enforced. [Citation.] ... [¶] A person merely in an advisory position to a city is affected by the conflicts of interest rule"].)

Importantly, however, the California Supreme Court recently clarified the standard used to determine whether an independent contractor is subject to Section 1090 in the first instance. (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230.) There, it held that Section 1090's reference to "officers" applies to "outside advisors [independent contractors, including corporate consultants] with responsibilities for public contracting similar to those belonging to formal officers." (*Id*. at p. 237.) In other words, Section 1090 does not cover all independent contractors – only those who are "entrusted with 'transact[ing] on behalf of the Government.'" (*Id.* at p. 240 quoting *Stigall, supra*, 58 Cal.2d at p. 570.)

With respect to the same energy services statutory scheme above, the Commission previously advised that Section 1090 prohibited the City of Pleasanton from entering into an energy services contract with the company that established the contract's scope of work as well as terms and conditions related to the implementation of the scope of work through its performance of services in a previous contract with the City. (*Sodergren* Advice Letter, No. No. A-19-057.) In subsequent advice, the Commission further advised that although Public Contract Code section 388 appears to permit the City of Pleasanton to contract with one energy services company to both design and implement an energy retrofit project when those services are contained in a single contract, Section 1090 prohibits the City from entering two separate contracts with the same energy services company where the subsequent contract's scope of work would be established through services performed under the initial contract. (*Sodergren* Advice Letter, No. No. A-20-042.)

In light of that advice, you ask whether Section 1090 would prohibit the City from entering into an energy services contract with a company whereby the company determines the potential scope of work for the energy services contract and then performs the work that the City selects, but only after the contract is amended to reflect the actual work the City authorizes the company to perform. As our previous advice implies, Section 1090 would not prohibit the City from contracting with a company to both determine the scope of work and then perform the work so long as all of the contemplated services are contained in a single contract.

Here, however, you state the contract would need to be amended after the company provides options for the scope of work to reflect the actual work the City authorizes the company to perform. A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d

191, 193; see also 98 Ops.Cal.Atty.Gen. 102 (2015) ["It is well settled that changes to existing contracts are themselves 'contracts' under section 1090"].)

Under the facts provided, you indicate the City's initial contract would provide the company with duties to determine the scope of work for the amended energy services contract. Because the company would have responsibilities requiring that it be involved in the City's contracting process at this preliminary stage, it would be subject to Section 1090's conflict of interest provisions. Moreover, because the company would determine the scope of work that is eventually selected by the City to be performed in the amended contract, it would be participating in the making of the amended contract through services it provides under the initial contract.

Therefore, similar to the advice provided in the *Sodergren* Advice Letters, *supra*, Section 1090 would prohibit the City from entering two separate contracts with the same energy services company where the scope of work in the subsequent amended contract would be established through services performed under the initial contract.[2]

Accordingly, Section 1090 prohibits the City from entering into a contract with a company to develop energy related improvement options and then to perform the work, but only after the contract is amended to reflect the actual work the City authorizes the company to perform.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By: Jack Woodside
Jack Woodside
Senior Counsel, Legal Division

JW:aja

[2] In addition, as we concluded in the second *Sodergren* Advice Letter, *supra*, "we do not find that the energy statutes referenced provide an exception to Section 1090, express or implied, to permit the City to enter two separate contracts with the same company where the subsequent contract's scope of work would be established through services performed under the initial contract."